SUPREME COURT OF THE UNITED STATES.

NO. 133.

CHARLES C. SMELTZER,
Plaintiff in Error,
against
MILES WHITE,
Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

This action was brought by the defendant in error in the Circuit Court of the United States for the district of Iowa, to recover for the breach of several alleged warranties of the genuineness of forty-eight county warrants, purporting to have been issued and declared upon as follows:

1 count. Two warrants, Nos. 184 and 185, by the county of O'Brien, June 5, 1865, for five hundred dollars each. *Rec. pp. 1, 2, and 28-9.*

2 count. Six do. by the county of Buena Vista, as follows:

No. 139,	dated	November 1st, 1862,	amt.....		$ 10 00
" 102,	"	August 29, 1863,	"		400 00
" 57,	"	January 11, 1864,	"		75 00
" 113,	"	" 2, 1865,	"		200 00
" 114,	"	" 2, 1865,	"		200 00
" 117,	"	" 2, 1865,	"		200 00
					1,085 00

Rec. pp. 2 and 12.

3 count. Two do. by the same county as follows:

No. 109, June 6, 1864	$500 00
" 120, Jan. 2, 1865	200 00

Rec. pp. 3, 4, and 10.

4 count. 11 do. by the same county:

No. 89, Feb. 28, 1866	$ 400 00
" 46, Dec. 23, 1865	500 00
" 53, Feb. 28, 1866	500 00
" 50, Dec. 23, 1866	500 00
" 160, July 11, 1865	500 00
" 43, Dec. 23, 1865	500 00
" 88, Feb. 28, 1866	300 00
" 87, Feb. 28, 1866	250 00
" 86, Feb. 28, 1866	100 00
" 85, Feb. 28, 1866	100 00
" 27, Jan. 12. 1866	100 00
Rec. pp. 5 and 14.	$3,850 00

5 count. Eight do. by the same county, as follows:

No. 49, Aug. 29, 1863	$ 200 00
" 13, Nov. 1, 1862	50 00
" 14, " " "	100 00
" 25, " " "	50 00
" 45, June 1, 1863	50 00
" 10, Nov. 6, 1862	100 00
" 90, Jan. 11, 1864	250 00
" 91, June 6, 1864	265 00
Rec. pp. 6 and 13.	1,165 00

There is an error in footing the amount of the above, being $100 too much, which was by mistake included in the judgment.

6 count. Six do. by the county of Clay:

No. 78, January 4, 1862	$ 31 00
" 161, " 6, 1863	45 00
" 164, " " "	30 00
" 224, Aug. 3, "	36 00
" 338, Nov. 15, 1864	56 00
" 16, March 4, 1865	30 00
Rec. pp. 7 and 14.	$228 00

There were three other warrants included in this sale, but are not in this action.

The seventh count was upon twenty-three Clay county warrants which were withdrawn after the finding of the special verdict.

The alleged warranties were in writing as follows:

1 and 3 counts:

"And I do hereby agree with the said Miles White that the above named are regularly issued by the authorities of the counties aforenamed, and that they are genuine county warrants.

NEW YORK, July 8, 1865. CHAS. C. SMELTZER."

2 and 6 counts:

"And I do hereby agree with the said Miles White that the above named warrants are regularly issued by the authorities of the said counties, and that they are genuine county warrants.

NEW YORK, June 9, 1865. CHAS. C. SMELTZER."

4 count:

"All signed by M. S. Jamison, clerk, and by Oliver Moore, treasurer, except warrant No. 27, for $100, which is signed by R. Ridgeway, treasurer, and No. 160 for $500, which is signed by Wm. S. Lee, treasurer, all of which warrants I guarantee are regularly issued by the regular authorities of said county of Buena Vista county, Iowa, and that they are genuine.

Oct. 26, 1866. CHAS. C. SMELTZER."

5 count:

"Received payment from Miles White, in full, for the above described warrants. The latter were issued by O'Brien county, Iowa, which I promise are regularly issued for consideration.

APRIL 25, 1865. CHAS. C. SMELTZER.

Pages 10, 11, 12, and 21, Printed Record.

The warrants were in form as follows:

"$10.00.] [No. 139.

"STATE OF IOWA,

Buena Vista County:

"CLERK'S OFFICE, *November 1, 1862.*

"The treasurer of Buena Vista county, Iowa, will pay to L. M. Lewis, or

bearer, the sum of ten dollars, out of the county funds in the treasury not otherwise appropriated.

"By order of the board of supervisors.

"Attest:

{SEAL CLERK DISTRICT COURT BUENA VISTA COUNTY, IOWA.}

L. M. LEWIS, *Clerk.*

(Endorsed:)

"Presented for payment July 6, A. D. 1863.

CHARLES A. LEE, *Treasurer.*"

The petition alleges that actions were brought against the several counties, at the October term of the circuit court, 1868. Rec. pp. 1-11.

The judgment records offered in evidence state that the actions were brought *April 19, 1870.* Rec. pp. 25-31.

As no question is made on account of the variance, perhaps, there is no impropriety in stating how it occurred, although it does not appear in the transcript. The actions *were* commenced as alleged in the petition, the several petitions were demurred to, the demurrers were sustained, and new or *substituted* petitions were filed at the date stated in the offer.

The breach relied upon was that the seal under which the warrants were executed was not the proper county seal of the respective counties; that it had been so decided in the actions against the counties.

The first session of the territorial legislative assembly was held in 1838, at which an act was passed providing for the election of "a board of commissioners," who should be "a body corporate and politic—*p. 102*, §4—with power to have and use a common seal, for the purpose of sealing their proceedings, and copies of the same when *signed and sealed by said commissioners*, and *attested* by their clerk, shall be good *evidence* of such proceedings on the trial of any cause in any court in this territory," *p. 103*, §10. In respect to orders upon the treasurer it was provided that "the clerk shall *attest* all orders issued by the board for the payment of money, and

enter the same in numerical order in a book to be kept for that purpose," —§*13*.

Substantially the same provisions are contained in the Revised Statutes of 1843. *Ch. 31*

This continued to be the law until 1851, when all their powers were transferred to the county judge. These statutes it will be observed, do not in terms require that county orders shall be sealed, nor do they prescribe any form of seal. There was no such requirement prior to the Code of 1851, nor was there any as to their payment by the treasurer until that time—*Code 1851*, §§*106, 152*. Sec. 106, as hereinafter quoted, is not contained in the Revision of 1860.

The provisions of the statutes upon that subject at the time that these warrants were issued were as follows:

Rev. § 222. "The county judge of each county having a seal is required to obtain, as soon as practicable, for his county a new seal of the same style with the present one, and with the same device but the inscription, on which shall be "Seal of the county of..... .....Iowa," (naming the county in capital letters,) and each new seal hereafter obtained shall be of the same description. The county seal is the seal of the county court, its capacities both of county and probate court, but the seals of the board of commissioners and of the probate court remain until the new seal is obtained.

Sec. 240. The county judge is required to keep his office at the county seat, and it is to be kept open at all usual times, and he is the keeper of the county seal.

The Code of 1851, from which these various sections were taken as they appear in the Revision, contained among the powers of the equity judge, this further provision: "Second, To audit all claims for money against the county, to draw and *seal* with the *county seal* all warrants on the treasurer for money to be paid out of the county treasury." § 106. Which was not retained by the commissioners.

The corresponding provision in the act creating a board of

supervisors, reads: "To examine and settle all accounts of the receipts and expenditures of the county, and to allow all just claims against the county, unless otherwise provided by law." Rev. § 312, sd. 4.

Sec. 244. Deeds for the conveyance of lands, and other contracts made by the county which are required to be formally executed, shall bear the name of the county, executed by the county judge in his official capacity, and acknowledged by him, and have the county seal affixed.

Sec. 360. It is the duty of the treasurer to receive all moneys payable to the county, and to disburse the same on warrants drawn and signed by the county judge, and sealed with the county seal, and not otherwise, and to keep a true account of all receipts and disbursements, and to hold the same at all times ready for the inspection of the county judge."

This was the *reading* of the statutes (except as stated above) at the time the warrants in question were issued, but the fiscal powers of the county judge had been some years before taken away by the act creating a board of supervisors, to which they were transferred. Rev. p. 48. The clerk of the district court was made the clerk of the board—§ 319—and among other things it is provided that "he shall *sign* all orders issued by the board, for the payment of money," *ib.*

The provision as to sealing, above referred to, was dropped by the commissioners. The board are required to keep a book to be known as the "warrant book," and are also directed to enter in their "minute book" all orders for the allowance of money. § 318.

The law does not require the board to keep a seal, and the only mention made of a seal to be kept by the clerk, is that "he shall be the keeper of the seal of the district court." § 343.

The act creating the board of supervisors declares that after its taking effect—July 4, 1860—neither the county judge nor the county court shall exercise any of the powers con-

ferred upon such board. § 324. And repeals all inconsistent acts. § 325.

The claim to recover was placed entirely upon the ground that the warrants were void for the reason that the clerk of the board affixed his proper seal of office as clerk of the district court, instead of the seal required to be kept by the county judge. The defendant offered to show, that :

"Said warrants were issued by the proper authorities for proper and legal claims against said counties, and that the same were in all respects regular and valid, unless they were invalid by reason of the omission of a seal, or the use of the seal of the district court.

To which offer counsel for the plaintiff objected, and the evidence was excluded; to which ruling and decision counsel for the defendant duly excepted." Rec. p. 58.

The plaintiff proved that he brought actions as alleged in the petition against the several counties upon these warrants, and that they appeared and demurred to his petitions. The demurrer in the first case reads as follows :

Now comes the defendant, by Galusha Parsons, its attorney, and demurs to the plaintiff's petition, and for cause of demurrer says:

1st. The same does not state facts sufficient to show that the defendant executed, or that it is in any way bound by the said alleged county warrants or writings obligatory.

2d. It does not appear by the said petition that the said county warrants were issued under the proper seal of the defendant.

The judgment upon this demurrer is as follows :

"This day this cause coming on for hearing on the demurrer to the plaintiff's petition, and the court having heard the same and arguments of counsel, and being sufficiently advised in the premises, sustains said demurrer and finds for the defendant.

It is therefore considered and adjudged by the court that the defendant have and recover of the plaintiff his costs in this behalf, taxed at $, and that execution issue therefor." Rec. p. 31.

The demurrer in the action against the county of Buena Vista reads as follows :

Now comes the defendant, by Galusha Parsons, its attorney, and demurs to the petition herein, and for cause of demurrer says—

1st. The same does not state facts sufficient to constitute a cause of action.

2d. The said warrants are not under the proper seal of the defendant, nor does the petition state any facts showing that the defendant is bound by the same. Rec. p. 56.

The judgment reads as follows:

"This day this cause coming on for hearing on the demurrer of defendant to plaintiff's petition, and the court having heard the same and arguments of counsel and inspection of the pleadings, sustain said demurrer, and the plaintiff refusing further to plead but elects to stand upon the demurrer, the court finds for the defendant. It is, therefore, considered and adjudged that the defendants have and recover of the plaintiff his costs in this behalf taxed at $ and that execution issue." Rec. p. 57.

The records in the other actions were in all respect similar.

The entire records in the two cases are printed in the records now here.

That he gave the defendant in this action notice to appear and prosecute those actions; that he failed to do so.

The defendant thereupon testified:

"That immediately upon receiving the notices that the plaintiff's suits against the counties were defended, he went to the plaintiff's attorney in said actions and requested possession of the warrants, that he might get the seal of the counties attached thereto, but he did not testify that he made any tender or offer of security, but he did testify that the said attorney refused his offer and did not deliver to him the said warrants."

The defendant further proved that:

"At the time of said several sales, the market value, on the assumption of the validity of said warrants, was from thirty to fifty per cent of the face thereof; that he purchased the same for about that sum, in the usual course of business as a dealer or banker, in good faith and without knowledge of any infirmity therein, and believing that the same were in all respects regular and valid; that he sold the same at the market value, or thereabouts, to the plaintiff so believing; that the plaintiff had retained all of the warrants so sold by him, without any notice of or intention to rescind said sale, or of any demand or claim by reason thereof, against him until the suits were brought by him on

said warrants against said counties, and the service of the several notices upon the defendant which are attached to the petition herein.

That at the time of the said sales, and prior thereto, the warrants were inspected by the plaintiff; that some warrants upon said counties were purchased by defendant upon the statement of the plaintiff that he would buy them from the defendant and would forward to plaintiff by mail; that the plaintiff in some instances retained such warrants for some time before concluding to buy them from the defendant; that in some instances they were without seal when purchased by defendant and forwarded to the plaintiff; that some of the warrants so executed were returned before purchase by plaintiff and payment therefor to defendant, with the request to procure the seal of the county to be affixed thereto, which the defendant did, and returned the same to the plaintiff, who thereupon purchased them on receiving the guaranties sued on; that the seal affixed to said warrants was the one uniformily *or often* used by said counties in the execution of county warrants.

That the plaintiff has received his pay upon a portion of the warrants sold by defendant to him, executed in the same manner, not including, however, any of the warrants in suit, and that he still retains and has all of the said warrants set out in the present petition, and has never offered to return the same to the defendant." Rec. pp. 57—8.

The Court charged the jury among other things, as follows:

"The first question which arises here is one which relates to the meaning of the defendant's written guaranties, to which I have called your attention; the substance of which is that these warrants were regularly issued, and were genuine county warrants.

II. The written or express guaranties mentioned in the first six (6) counts of the petition, and which have been introduced in evidence, extend to and cover the defect of want of seal, or want of the seal of the county, on the warrants to which said guaranties relate and mean, that the warrants as sold and delivered are *legally enforceable* as warrants, and that an action may be maintained thereon against the counties, and as such an action was not in law maintainable, because the warrants sold did not bear or have the seal of the counties, and because this fact has been decided in actions by the plaintiffs against the counties, the said warranties or guaranties are broken, and the defendant is liable thereon or in respect thereto.

III. As to the measure of damages, the amount which the plaintiff paid the defendant for the warrants is *prima facie* evidence of their value at the time; and there is also the evidence of the defendant that they were sold by him to the plaintiff for their market value, based on the assumption that they were valid, and there is no other or different evidence on the subject of value. I

therefore instruct you that the plaintiff is entitled to recover on the warrants introduced in evidence and produced before you, named in the first six counts of the petition, the amount of the consideration which the plaintiff paid and the defendant received therefor, with six per cent interest per annum on such amount.

IV. It is not necessary thus to recover that the plaintiff should, before suit was brought, have tendered back the warrants mentioned in said written guaranties; it is enough that they are in court at the trial, and the court can order them to be retained, and *on payment of the judgment* rendered herein to be delivered to the defendant.

V. As to the first six counts in this petition, as to which there is an express guaranty, you must find for the plaintiff the amount which the defendant received from the plaintiff upon the purchase of the warrants, with six per cent interest from the time of the receipt of the payment. Rec. pp. 59–60.

The defendant excepted to the following portions of the charge:

1. To that portion whereby the court directed the jury to find for the plaintiff upon the written guaranties.

2. To that portion which instructed them that said guaranties were broken.

3. To so much thereof as instructed them that the plaintiff was entitled to recover without returning the warrants.

4. To that portion which holds that the warrants might be produced and returned after payment. *Rec., p. 60.*

The defendant requested the court to charge the jury as follows:

1. That if they find from the evidence that the plaintiff did not offer to return the warrants before action was brought, and still holds the same without any offer to return or surrender them, he is not entitled to recover.

The court refused so to charge, and counsel duly excepted.

2. That the former judgments do not estop the defendant from showing that said warrants are valid; that the question of their validity depends upon whether they were duly ordered by the boards of the several counties named, and not upon the mode of their formal execution by the clerks of such boards.

The court refused so to charge, and counsel duly excepted.

3. That if the jury find from the evidence that said warrants were regularly issued by order of the several boards of supervisors directing the same, for a valid and subsisting indebtedness by said counties, respectively, for the several amounts thereof, and that the plaintiff has not at any time offered to return them, he can only recover the difference between their value without the county seal and their value with said seal at the time of the several sales, and interest.

The court refused so to charge, and counsel duly excepted.

4. That the several assignments of the warrants carry with them the right to sue for and recover the several demands for which they were issued; that if the plaintiff has retained the warrants without any offer to return them until the right of action upon the original indebtedness is barred by the statute of limitations, and the right of the holder to compel the proper officers to affix the county seal to the warrants is also barred by the statute, they should find for the defendant.

The court refused so to charge, and counsel duly excepted. Rec. pp. 61–2.

ASSIGNMENT OF ERRORS.

I. The court erred in holding that the warrants required a seal, or if a seal were requisite, that they were not properly sealed.

II. If the warrants were invalid for want of a seal, such invalidity being patent and as well known to the plaintiff as to the defendant was not within the warranties. The charge upon that subject reads :

CHARGE.

"The written or express guaranties mentioned in the first six counts of the petition, and which have been introduced in evidence, extend to and cover the defect of want of seal, or want of the seal of the county, are the warrants to

which said guaranties relate and mean; that the warrants as sold and delivered are legally enforceable as warrants, and that an action may be maintained thereon against the counties, and as such an action was not in law maintainable, because the warrants sold did not bear or have the seal of the counties and because this fact has been decided in action by the plaintiffs against the counties, the said warranties or guaranties are broken, and the defendant is liable thereon or in respect thereto." *Rec. p. 57.*

III. There was no breach of the warranties. They were in effect that the several instruments were what, by their terms, they appeared to be, that they were *genuine* and *regularly issued.*

The court erred in this regard:

1. In holding that a warranty in the terms of these several instruments extended to patent and visible defects.

2. In holding the defendant liable for a mistake of law; the facts, as stated by him, all being true.

IV. The court erred in holding the defendant estopped by the former judgments. See charge printed second specification.

V. The court erred in excluding defendant's offer—Rec. p. 58—to show that the warrants were regularly issued for legal claims against the several counties.

OFFER.

The defendant, to further maintain the issues upon his part, offered to prove that said warrants were issued by the proper authorities for proper and legal claims against said counties, and that the same were in all respects regular and valid, unless they were invalid by reason of the omission of a seal, or the use of the seal of the district court.

To which offer counsel for the plaintiff objected, and the evidence was excluded; to which ruling and decision counsel for the defendant duly excepted.

VI. The court erred in charging that the several warranties extended to the want of the proper seal, and that they "meant that they were legally enforceable as warrants," and in the further charge that they did not have the seal of the county, and that the defendant was bound by the former decision upon that subject.—¶. II. Rec. p. 59. See charge second specification.

VII. The court erred in charging that plaintiff could recover the full amount of the consideration paid upon the purchase without retaining the warrants—¶. III. Rec. p. 59.

CHARGE.

"As to the measure of damages, the amount which the plaintiff paid the defendant for the warrants is *prima facie* evidence of their valne at the time; and there is also the evidence of the defendant that they were sold by him to the plaintiff for their market value, based on the assumption that they were valid, and there is no other or different evidence on the subject of value. I, therefore, instruct you that the plaintiff is entitled to recover on the warrants introduced in evidence and produced before you, named in the first six counts of the petition, the amount of the consideration which the plaintiff paid and the defendant received therefor, with six per cent interest per annum on such amount."

VIII. The court erred in charging that it was sufficient that the warrants were in court, and that the court could *order* them to be returned upon *payment of the judgment.* The plaintiff having made no offer to return them upon the trial, or at any other time.—¶¶. V., VI., Rec. p. 59-60.

CHARGE.

It is not necessary thus to recover that the plaintiff should, before suit was brought, have tendered back the warrants mentioned in said written guaranties; it is enough that they are in court at the trial, and the court can order them to be retained, and on payment of the judgment rendered herein to be delivered to the defendant.

IX. The court erred in refusing to charge as requested by the defendants that there could be no recovery without returning the warrants.—¶. I. Rec. p. 61.

REQUEST.

That if they find from the evidence that if the plaintiff did not offer to return the warrants before action was brought, and still holds the same without any offer to return or surrender them, he is not entitled to recover.

The court refused so to charge, and counsel duly excepted.

X. In refusing to charge as requested that the former judgments did not estop this defendant, and that the question of the validity of the warrants did not depend upon their formal mode of execution, but upon whether they were properly ordered by the boards of supervisors of the several counties.—¶. II. *ib.* 61.

REQUEST.

That the former judgments do not estop the defendant from showing that said warrants are valid; that the question of their validity depends upon whether they were duly ordered by the boards of the several counties named, and not upon the mode of their formal execution by the clerks of such boards.

The courts refused so to charge, and counsel duly excepted.

XI. In refusing to charge that if the warrants were regularly issued in payment of a valid, and subsisting indebtedness by said counties respectively for the several amounts thereof, and the plaintiff had not returned or offered to return them, that the amount of his recovery could not exceed the difference between the value of the warrants with the proper seal, and their value without it.—¶. III. *ib.* p. 61.

REQUEST.

That if the jury find from the evidence that said warrants were regularly issued by order of the several boards of supervisors directing the same, for a valid and subsisting indebtedness by said counties, respectively, for the several amounts thereof, and that the plaintiff has not at any time offered to return

them, he can only recover the difference between their value without the county seal and their value with said seal at the time of the several sales, and interest.

The court refused so to charge, and counsel duly excepted.

XII. The court erred in refusing to charge that the several assignments of the warrants carried with them the indebtedness for which they were issued, and if the plaintiff had retained the warrants without any offer to return them, until the right of action upon the original indebtedness was barred by the statute of limitations, and the right of the holder to compel the proper officer to affix the county seal, was also barred, the jury should find for the defendant.—¶. II. *ib.* 61.

REQUEST.

That the several assignments of the warrants carry with them the right to sue for and recover the several demands for which they were issued; that if the plaintiff has retained the warrant without any offer to return them until the right of action upon the original indebtedness is barred by the statute of limitations, and the right of the holder to compel the proper officers to affix the county seal to the warrants is also barred by the statute, they should find for the defendant.

XIII. The court erred in holding the defendant bound by the former judgments, as the plaintiff refused to allow him the possession of the warrants for the purpose of procuring the proper seals, and preparing for trial.

I.

It is submitted:

1. That the warrants would have been duly executed if without a seal.

2. If a seal were required, that it should be the seal of the officer upon whom the law imposed the duty of drawing and executing them.

When the county judge had the management of the business of the county, he was invested with the usual powers and jurisdiction of county commissioners, and the county funds could be paid out by the treasurer only upon warrants issued by him. Rev. §§ 241, 243, 360.

This system of local administration continued until 1860, when it was superseded by the act already referred to, creating a board of supervisors, and by that act all jurisdiction in respect to matters of this kind was in express terms taken from the county judge, but his judicial powers were unaffected.

By section 222 of the Revision, he was required to procure a county seal, which was declared to be the seal of the county *court* in its capacity both of county and probate court. Of this seal he was the keeper. § 240. The clerk of the district court was properly the clerk of the county court, but the judge might perform this duty himself. §§ 347 and 271. I can find no express requirement in the statutes for the use of the county seal where the act is not properly and strictly of a judicial character, except in the execution of conveyances of lands, contracts to be formally executed, and county warrants. Under the new system no provision was made for the use of a seal. The clerk of the district court was made the clerk of the board of supervisors, and as such it was his duty "to *sign* all orders issued by the board for the payment of money." § 319. The provisions in respect to this duty when it was performed by the county judge, were first, "To audit all claims for money against the county, to draw and *seal* with the *county seal* all warrants on the treasurer for money to be paid out of the county treasury." Code § 106. And second, "As the judge issues warrants from time to time, he is required to deliver to the treasurer a memorandum of the

number, date, amount and drawee's name of each." Rev. § 243. The latter was also required to be done by the board of supervisors. § 318.

The phraseology of the statutes referring to the duties and office of the county judge, was not changed to conform to the new system. It was left for the courts, under §§ 324-5, when the power was not named in terms, to determine how the various provisions running through the statutes, where reference was made to the county judge were affected by the change and upon whom the duty was imposed. The question now here I suppose to belong to this class.

By whom, under the new system, are county orders to be drawn and executed?

By the provisions of the statutes above referred to, all duties pertaining to the finances of the county are taken from the county judge, and transferred to the board of supervisors, and among these is the power to settle and allow all just claims against the county," § 312; and to order warrants to be drawn upon the treasurer, which are to be *signed* by their clerk. In respect to their payment the statute in force when the county judge performed these duties has not been changed, it still reads, "the treasurer shall disburse the same on warrants *drawn* and *signed* by the county judge, and sealed with the county seal, and not otherwise." The next section reads "when the warrants drawn by the judge," etc.

There was a time, after the law abolishing the boards of commissioners, and conferring their powers upon the county judge, Code of 1851, when the use of another, I may say any other, seal was proper, and the treasurer was bound to pay warrants attested by it. The statute, § 222, says "the seals of the boards of commissioners * * * remain *until the new seal is obtained.*" There was at that time no provision corresponding to section 360 of the Rev.

At what time after the transfer of power from the commissioners to the county judge did it become the duty of the

treasurer to refuse *to pay* warrants unless evidenced by the particular form of seal required by section two hundred and twenty-two? The statute says *when the new seal was obtained*, it might be months, or it might be years. During that time, whatever it might be, there was no form of "county seal," which the treasurer was required to recognize as *the* seal to the exclusion of any other, when that time ceased, was not a question of law but of fact. Suppose the treasurer of one of these counties had paid the warrants and been sued upon his official bond, the breach alleged being that he had paid out the county funds upon warrants not sealed with a seal inscribed in "capital letters, seal of the county of....., Iowa," would not the petition have been demurrable upon the ground that it did not allege that the county had "obtained a seal" with that inscription, or in some other form, that he was authorized to pay out money upon warrants drawn under such a seal only? While it was made the duty of the county judge to obtain a new seal "*as soon as practicable*," there was a time when he could properly use the old one; for example, in drawing a warrant to pay for the new one. It appears to me to be manifest, that it was not the intention of the legislature to make the validity of county warrants depend upon the particular form of seal under which they were drawn; but concede that it was, the *time* when that statute would have that effect is made by *its terms* dependent upon certain matters *in pais*. If the validity of these warrants cannot be determined by the statute alone, in other words, if they do not appear upon their face to be invalid, may evidence be received upon that subject, and if so, from which party should it come?

There was a time, when assuming that the warrants were *prima facie* invalid, it would have been competent for the holder to show that the county had *not* obtained a new seal. If competent for a month after the going into effect of the act directing the county judge to procure such seal, at what

particular point of time can it be said as matter of law, that it would become incompetent?

If the continuance of the state of things existing at the time of the passage of this act, namely, the use of any seal that the county officers saw proper to employ, was to terminate, not by lapse of time, but upon the occurrence of some particular thing to be done by one of the county officers, is the burden of proof upon that subject upon the party, alleging the affirmative and claiming exemption upon that ground, or must the other party prove the negative? It is admitted that these warrants were duly authorized, and regularly drawn in payment of valid claims, and that they are legally enforceable, unless the want of a seal with a particular inscription, in capital letters, makes them invalid. I remember to have somewhere seen a decision in which it was held that the use of figures and the customary dollar marks in declaring upon a promissory note, in which the words were written at large, was a fatal variance, but I have no recollection, that failing to put it in capitals has been any where so held. If the warrants *may* be valid in this form, I suppose the presumption to be that they are valid. The question would then be whether, the contract out of which the indebtedness arose being entirely executed, and nothing remaining but to make payment, the debtor might escape by showing that the orders drawn by him upon his treasurer, were not such as he had instructed him to pay. Even that, however, would not sustain the judgment in this case, no evidence was given of their invalidity, the court holding that they so appeared upon their face, and evidence to show them valid was rejected.

I submit:

1. That as all of the powers of the county judge in respect to these matters have been taken from him, and transferred to the board of supervisors, by necessary implication, where the duties of other officers were dependent upon his action, they

will now depend upon that of the board of supervisors; that the courts will, by *construction*, apply the language of the statute to the new system, in such a way as to make it possible for the several officers to perform the duties which are imposed upon them. The duty of the county judge in drawing warrants, and that of the treasurer in paying them, were correlated by the provisions of sections 106 and 152 of the Code. The former is not contained in the Revision of 1860, and it is conceded that it is no longer the law. To say that the latter which was drawn with express reference to, and in a sense supported by it, can remain after its support is gone, is much like saying that the branches would retain their places after the trunk was taken away. This cannot be avoided by saying that the corresponding provision, as to the manner in which the clerk shall draw warrants, takes its place, without introducing into that provision what the legislature has not put there, and the very point in controversy here "under his seal."

2. That the power being expressly given to the board of supervisors to draw warrants upon the treasurer to be *signed* by their clerk, no other formality is required in their execution, that it would have added nothing to the meaning of the statute if stated in terms, "and the county treasurer shall pay the same;" that the law requiring a seal is repealed; first, by the repealing clause contained in the act of 1860, and second, upon the clearest principles of construction, or if a seal is requisite for any purpose, it is only in respect to the treasurer's duty to pay, and its omission would not defeat the right to maintain an action upon the warrants.

3. The county judge is the sole custodian of the county seal. The clerk of the district court when acting as clerk of the county court could affix the seal only when authorized by an order of that court. The board of supervisors have no

more authority over that seal than they have over the seal of the district court. It is as clerk of the district court that the incumbent becomes *ex officio* clerk of the board of supervisors; he has charge of the seal of that court and of that court only. If his acts are to be authenticated by seal, should it be by a seal proper to his office, of which he has the custody and a right to affix, or should it be by a seal of which he has not the custody, which is not proper to his office and which he has no right to affix?

4. Whether the treasurer was bound to pay the warrants or not, it was no defense when action was brought upon them to say that they were not sealed. They are complete as evidences of debt when properly authorized, and drawn as the statute requires; a near approach, perhaps to hair splitting, but no nearer than that which holds all of the other conditions of the statutes repealed, and leaves that which relates to the seal standing.

I suppose the validity of a warrant to depend upon the law in force at the time it was drawn, while perhaps, the duty of the treasurer to pay it would depend upon the law in force at the time that it was presented. By the present law of Iowa no form of seal is prescribed, section 222 of the Revision is omitted in the Code, and the statute now directs counties to keep "a seal such a provided by law," Co. § 279, Rev. § 221, but the law does not provide anything in respect to it. That being so, I suppose a county may adopt any seal. I understand the law—assuming it to be in force, as to the payment of county warrants—to be a direction to the treasurer not to pay unless the warrant is under a particular seal If a warrant were duly authorized, but not drawn in the particular form required at the time, in order to make it compulsory upon the treasurer to pay it, that law being in the meantime repealed, could he then refuse to pay it?

This question has been before the Supreme Court of Iowa, in *Springer v. The County of Clay, 35 Iowa, 241*, since the trial of this case, and decided adversely to the views here presented. But at the time that these warrants were issued and sold to the plaintiff, there had been no such decision, and it is submitted that this court may properly give such construction to these statutes as in its judgment they ought to receive.

In arguing this question I have not forgotten that the rule of this court is, that "the construction given to a statute of a state, by its highest judicial tribunal, is regarded as a part of the statute," but as I understand *Gelpecke vs. Dubuque* and that class of cases, this is the rule only when the transactions constituting the snbject of the litigation took place subsequent to the decision. If I understand the case of *Havermeyer vs. Iowa County. 4 Wall., 294*, it is precisely parallel in this regard to the present. The validity of the bonds, issued in 1853, seems to have depended upon whether the law under which they were issued was to be regarded as a public or a private statute; if the latter they were valid, if the former they were invalid. The supreme court of Wisconsin decided, in 1859, that it was a public statute, and consequently held the bonds invalid. This court says, in speaking of the decisions of that court, "being long posterior to the time when the securities were issued, they can have no effect upon our decision, and may be laid out of view, we can only look to the condition of things when they were sold." I cannot ascertain, from the report of the case, that there was any claim, as in the Iowa bond cases, that the bonds were issued in reliance upon any prior judicial construction of the statute, but the case in that respect seems to have been like the present. If the principle upon which this court adopts the construction given by the state courts to their own statutes is, that such construction is to be regarded as a part of the statutes, and that the parties may be held as having contracted with respect to it, there can be no argument as to whether this rule should or should not apply to this case.

II.

Second and third assignments. The construction given to these warranties by the court below, was, not that they related to the genuineness and the regularity of the issue of the warrants, but that upon the facts appearing upon their face and known alike to both parties, the defendant *warranted the law.*

If it were possible to create a liability in that way the fair, reasonable import of the language of these instruments would clearly exclude such a construction. That they are "genuine and regularly issued," not forgeries; that they were not issued without consideration, and that they were ordered by the proper officers, are the things warranted. These things being true, and about that no question was raised upon the trial, was the defendant liable for anything beyond?

He had bought the warrants in the usual course of business as a banker; he sold them in the same way to another banker; he undertook that they were, what upon their face they appeared to be. Does a warranty extend to the legal questions that may arise upon the construction of an instrument, or to technical defects appearing upon its face?

If the plaintiff was equally bound with the defendant to know the law, I suppose these instruments may be construed as if the law were written upon their face. The warrants read "seal of the clerk of the district court," the law says the treasurer shall not pay them unless they read "seal of the county of * * * Iowa." The court held that provision still in force and construed the warranties to be that the warrants were legally collectable, and that they would be paid although the statute as construed by it said they should not be paid.

I understand that a warranty extends to *facts* only, and as a consequence that when all of the facts are as warranted

there can be no breach. To apply this rule to instruments of this kind, when one warrants their validity, and that depends upon facts not apparent upon their face, I understand him to warrant that every fact essential to their valid execution has taken place, but I do not understand him to warrant that an instrument is valid which upon its face appears to be invalid.

III.

Fourth assignment. The court erred in holding the defendant estopped by the former judgments.

It is possible that this question is of but very little importance, for if he was not answerable over, very clearly he is not estopped, if he is answerable over all of the facts, were shown upon this trial. But in respect to the amount of the recovery in the view that the court took of it is still of importance.

The plaintiff sought to recover the face value of the warrants, and did recover under the rulings and charge of the court, the full consideration paid for them. The defendant insisted, if he could recover at all, that the measure of damages, there being no return or offer to return the warrants, was the difference between their value with the supposed seal and their value without it ; that whether valid or invalid they represented an indebtedness which had been audited and allowed by the several counties, and that their transfer operated as an assignment of the claims which they represented. This question was presented in various forms, but the court refused to submit it to the jury, upon the ground, I suppose, of the

alleged estoppel that, that question might have been tried in the suits against the counties. If that was the ground, it is of consequence to determine, first, whether he was estopped at all, and second, whether such estoppel would extend to this subject when sought to be shown to affect the measure of damages. When a *recovery* is had against one who has a right of action over, in accordance with the decision of this court in *Chicago v. Robbins, 2 Bl., 418*, and the settled rule, I suppose such judgment is conclusive against the latter. But I understand, that it is conclusive only upon such matters as either actually were or might have been tried "within the legitimate scope of the pleadings," in the former suit. Conceding without question the rule to this extent, it certainly would be a new idea that it could be further extended so as to embrace matters which were not tried or put in issue, and which the court in which the former suit was brought, would have had no jurisdiction to try. It seems to me that these judgments are not a bar, first, for the reason that the petitions in the cases in which they were rendered were not drawn so as to present the merits of the plaintiff's claim. The *right* to recover was based upon the indebtedness of which the warrants were merely evidence. One of the questions raised by the demurrer related to the technical execution of the warrants the others to the sufficiency of the petitions. It does not appear upon what grounds they were sustained. The jurisdiction of the court depended upon the character of the instruments the claims themselves could not be brought within it, had the plaintiff declared upon an assignment to him of these claims, his actions would have been dismissed for want of jurisdiction. As I understand the law, a judgment upon demurrer is a bar only when the court in which the action was brought had jurisdiction of the entire merits of the controversy, and the pleadings were so framed as to present them.

When there are two grounds of demurrer, one of which goes to the form of action and the other to the merits, and

the decision does not show upon which ground it was sustained, it will be presumed that it was sustained upon the former ground alone.

Griffin vs. Seymour, 15 I., 30.

A decision upon a demurrer is a bar only as to the facts actually set out.

Keater and others vs. Hock and others, 16 ib. 25.
In *W. A. & G. S. P. Co. vs. Sickles and others, 24 How., 333.*

This court lays down the rule as to judgments upon demurrer as a bar in this way: "A judgment that a declaration is bad in substance which alone and not matter of form, is the ground of a general demurrer, can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment upon the merits."

And see *Gilman vs. Rives, 10 Pick., 301.*
Stevens vs. Dunbar, 1 Blackf., 56.
Sherry and others vs. Forsman and others, 6 ib., 56.

A judgment upon demurrer is a bar only when it determines the whole merits of the case.

Robinson vs. Howard, 5 Cal,, 428.

A decision upon a demurrer is a bar only where it clearly appears that the court has decided upon the merits between the parties.

Story's Eq. Pl., § 456, and notes.

By the merits of an action I understand the substantial grounds of recovery or defense. In this sense, the plaintiff's right to recover from the several counties was in no way involved in the former actions. That these are not negotiable instruments within the protection of the rules of the law

merchant, has been decided by the Supreme Court of Iowa—*Clark vs. Polk Co., 19 Iowa, 247*—but being payable to bearer every one knows that the holder is not an assignee within the acts relating to the jurisdiction of the circuit courts; they carry with them, too, a right to recover the claim for which they were issued. See *Dana vs. City of San Francisco, 19 Cal., 486.* If the plaintiff saw proper to sue in a court which had no jurisdiction of the entire controversy, will a judgment against him, if an estoppel at all upon his warrantor, estop him from showing that the warrants were worth something, that they were not mere nullities, and that that question has not been tried?

That they represented valid claims to their full amount was not questioned; that these claims passed, I think, is clear upon the law; they were worth something, and there was nothing in the former actions in fact decided upon the subject. As I claim without any regard to the question of estoppel, that the case was submitted to the jury upon an entirely erroneous theory as to the measure of damages, as well as upon the right to recover, perhaps I am spending too much time with this question.

The court treated the action as if bronght to recover the consideration paid, and directed the jury, without leaving to them any question of fact, to find a verdict for the plaintiff for that amount. I do not understand the law to be, nor have I been able to find any case which holds, that such an action may be maintained without a return of the instrument sued upon before action brought, unless it is shown that the subject of the transfer was entirely worthless, or where it was the party's own paper, when it may be returned upon the trial. If the contrary is not elementary learning, the commentators have not appreciated what they were about.

IV.

Fifth assignment. What I have said under the last division of my argument will also in great part apply to the fifth assignment of errors. If the warrants were regularly issued upon valid claims, the defendant should have been allowed to show it for two purposes.

1. As affecting the measure of damages.

2. To defeat plaintiff's recovery upon the ground that he had kept them until they became worthless, which I shall argue under my next point. I have also said all that I desire to say as to the sixth, seventh, eighth, ninth and eleventh assignments, as they are but different forms of presenting, very nearly the same questions.

V.

Twelfth assignment. Upon this it is submitted as already argued,

1. That the assignments of the warrants carried with them the claims upon which they were issued.

2. When a purchaser elects to demand and sue for the repayment of the consideration, as upon a rescission of the contract, he must make his election forthwith upon the discovery of the breach of warranty, or at least without unreasonable delay, and the article must be returned in the same condition as when received; his right to recover the consideration is complete only upon tender of the thing purchased.

3 That by retaining the warrants until the right of action upon the claims, which they represented was barred by the

statute of limitations, and the right to require the affixing of the proper seal was also barred, he waived his right to rescind the contracts. To have returned the warrants upon the day of trial (even that was not offered) or after payment of the judgment, would have been to place in the hands of the defendant so many worthless pieces of paper. The right of action upon the original claims by the statutes of Iowa was barred in five years from the time it accrued; Rev. § 2740. The right to require the affixing of the seal in three years *ib.*

Prescott v. Gonser, 34 Iowa, 175.

I cannot think it necessary to search for authorities to support propositions which are founded, as it appears to me these are, upon principles clearly elementary.

The assignments were made at the following dates:

1 and 3 counts, in the same instrument, July 8, 1865.
2 and 6 do....in one.....do. .... June, 9, 1865.
4 count, without date, but see the petition, Oct. 26, 1866.
5 do. ..... April 25, 1865.

The warrants in the first count were dated June 5, 1865; those in the second, all between the 1st of November, 1862, and the 2nd of January, 1865; those in the third, were dated June 6, 1864, and January 2, 1865; those in the fourth, all between the 11th of July, 1865, and February 28, 1866; those in the fifth, between November 1, 1862, and June 6, 1864; and those in the sixth, between January 4, 1862, and March 4, 1865.

The former actions were originally commenced for the October term of the circuit court for 1868. The defendant was not notified that they had been brought until May 2, 1870, after these petitions were filed and *a year and a half after the cases had been decided upon demurrers to the original petitions.* There were other warrants in controversy issued prior to the going into effect of the act creating a board of supervisors, which the court had held properly executed, as to

those he was required to furnish proof, but as to those now here one of the notices was that the court "*has* held them not sufficiently attested," the others to assist in the prosecution and furnish evidence. Rec. pp. 13, 16 and 17.

The demurrers now here were filed May 11, 1870, to *amended* petitions, filed after those to the original petitions had been sustained. This action was commenced for the October term of the circuit court for 1870, and tried May 22, 1872.

At the time that these warrants were sold to the plaintiff below, the claims upon which they were issued were in full force, not barred by the statute of limitations; if the warrants were not properly executed the right to have the proper seal affixed was not barred. When the notices to appear and prosecute the former actions were served upon the defendant, the claims upon which the warrants were issued, assuming them to have been contemporaneous with the dates of the warrants, (the defendant's evidence upon that subject was excluded; Rec. p. 58,) were most of them barred by the statutes, and the right to require the affixing of the seal was barred as to all of them.

If the law is that upon a warranty or guaranty, or whatever those declared upon in this case may be called, the purchaser may, without notice, retain the paper purchased for years, and until it becomes worthless, (if it be said that I blow both hot and cold in arguing that the paper is of no value, and at the same time that it should be returned, I answer it is not competent for the plaintiff to excuse himself by saying that he has *kept* it until it has become worthless,) and then without returning it, even at that time, recover the consideration paid most of the questions sought to be raised by the defendant's counsel upon the trial, except those relating to the validity of the paper as it appears, being subordinate to that, are of no consequence. If such is not the law, in its divisions and subdivisions, this argument is extended altogether too far. If it is debatable ground, perhaps it is. The court held in every

form in which these various questions were presented, that the warranty was of *the law, upon patent facts;* that it was broken when it turned out, by a most unexpected decision of the courts, some years afterwards, that the parties were mistaken upon that subject—a subject that had never been thought of in the State of Iowa at that time, as in the courts, both state and federal judgments were obtained at every term upon warrants executed under this seal—that the plaintiff could recover the full amount of the consideration without returning the warrants; that it was not competent for the defendant to show that they were regularly issued upon full consideration as affecting their actual value in their present form, at the time of the sale and before barred by the statutes; in short, that it was no defence to the action that the facts warranted were all true.

The defendant purchased the warrants, as a banker, in the ordinary way, probably paying for them very nearly what he received, that being their market value, upon the assumption "as the charge says, that they were valid," they were sent to the plaintiff, another banker, some of them without any seal; —the latter were returned, and *this* seal being the only one used any where in the state at that time, so far as the evidence shows, and the proper one as the law was then understood,) affixed to them. The charge says "uniformly *or often*" in speaking of the seal. I suppose "*often*" was used with reference to the cases in which there was no seal, for there certainly was no evidence of these counties or any others having used any other seal after the creation of a board of supervisors, and this—*dies infaustus*—was used *very* often.

VI.

Thirteenth assignment: The defendant, upon claim being made against him, offered to procure the affixing of the proper seal.

The bill of exceptions says that he did "*not* testify that he offered" security. It does not say that any one *did* testify that security was demanded, that anything was said upon that subject, or that the refusal was put upon that ground, or that it appeared that he was not abundantly responsible. The question which the court submitted to the jury was, whether he offered to pay back the consideration, not to give security for the return of the warrants, *5th finding, p. 63.* The evidence upon that subject was offered with this idea, the defendant had been notified that demurrers to the original petitions had been sustained upon the ground that the warrants were not properly sealed; Rec. pp. 11 and 15; and he was required "to furnish *proof* and to assist in the prosecution of said causes." As to the warrants to which the request to produce proof related, those issued by the county judge prior to the law of 1860, of course, plaintiff having obtained judgment upon them, they are not in this action—see seventh count and the list of warrants attached—as to those which had been already decided upon demurrer why should he appear, unless he could come prepared to meet the grounds of demurrer? It does not appear that any of these counties had ever sought to defend against any just indebtedness because their warrants were not properly sealed. The fact that they availed themselves of a technical defense creates no presumption one way or the other. After the lapse of so many years it certainly was not unreasonable that they should desire to see the warrants, and by a comparison of them with their books to ascertain whether they ought or ought not to be paid, and especially in view of the fact that in that part of the state there had been large issues of warrants fraudulently made.

The defendant upon the trial offered to show—Rec. p. 58—that these warrants were in all respects regularly issued, which evidence the court excluded, but he was allowed to show that he offered to procure the county seals. If he had been allowed possession of the warrants, and the several boards of supervisors could have been satisfied that they were properly issued, they would undoubtedly have directed the affixing of the seal used by them after the decision upon the demurrers, that the one under which these warrants were issued was not the proper one. Being refused the means of preparing for a successful prosecution of the actions, or rather of obtaining a recognition of the plaintiff's claims, when no defense would have been made, it seems to me that it was not unreasonable to decline to take a nominal part in a litigation which was supposed to involve his interests when denied the right to take any real part in it. I think that a party who is claimed to be answerable over, ought not only to have timely notice of the pendency of the action by which he is sought to be bound, but that he ought to be allowed the means, so far as they are in the control of the party making the claim against him, of preparing for trial, or better, of removing the grounds of defence. It does not seem to me that a statement in a bill of exceptions, that the defendant did not swear to a certain fact, when it does not appear that any allusion was made to that subject, either at the time of the offer, or upon the trial, ought to be held as indicating that the refusal was put upon that ground, or that such a statement ought to be "called in" to support a ruling to which exceptions were taken.

Three views were taken upon the trial as to the measure of damages. The plaintiff claimed, both in his petition and upon the trial, that he was entitled to recover the par value of the warrants; the defendant claimed that, if he could recover at all, the amount of the recovery should be limited to the difference between the value of the warrants with the seal,

and their value without it. The court held both wrong, and that the true measure of damages was the consideration paid, with interest.

Both parties excepted, and settled their exceptions; the plaintiff, I suppose, has abandoned his. But it is this idea of a right to recover the face value of the warrants, that accounts for his refusal to let the defendant have them, a judgment against him would have been, as he probably thought, sooner paid than one against the counties. I think defendant should at that time have been allowed the means of protecting himself, and that it should not be presumed that the plaintiff put his refusal upon a ground to which it does not appear that he has, at any time, made the slightest allusion. It may be that the request was an unreasonable one, and that the defendant was not entitled to the possession of the warrants for that purpose ; but as I understand the law, one who seeks to bind another by the result of a litigation to which he is, and the other is not a party, must afford him all reasonable means for properly conducting it, at least that he do not deny to him such means, or throw any impediments in the way of its proper management, and that whether he has done so or not is ordinarily a question for the jury. But whether I am right or wrong as to this, the decision should stand upon its merits, and not upon what did not take place, or what was not proved or alluded to upon the trial, unless it was incumbent upon the party under the law to prove what it is said that he did not prove. If the means which the defendant asked to be allowed to employ were reasonable, and he could only be allowed to do so upon giving security, of course his request would be of no consequence unless he offered such security, whether demanded or not, or unless it appeared that security was waived. But if that is not the law, and the reasonableness of the *refusal* depends upon a demand of security, and a refusal to give it the proof should come from the other side. I do not understand, however, that there is any rule of law,

one way or the other, upon the subject. Cases might easily occur where a demand for security would be entirely reasonable, but that is a very different thing from saying that when no demand is made, a party who has been denied the necessary means for preparing for trial, should in the first instance be required to prove that he tendered security, and that again is a different thing from saying that when no allusion is made to the subject of security, either at the time of the request or upon the trial, the law will imply a demand, and that the refusal was put upon that ground. This would be carrying legal implications and mental reservations based upon them, very nearly into the regions of guessing.

In conclusion, it is submitted, first, that under the statutes correctly construed, the warrants were properly executed; second, that if their invalidity were conceded, that, being a question of law upon facts patent upon their face, it would constitute no breach of the warranties; third, if it were conceded that the warranties were broken, the plaintiff not only failed to show facts sufficient to entitle him to recover, but did show facts which, if they were not sufficient entirely to defeat that right, should have reduced the recovery, in the absence of evidence as to value, to nominal damages; and, fourth, conceding all these things against the defendant, the court erred first, in holding that the measure of damages was the consideration paid; and second, in holding either, that such recovery might be had without a return of the warrants, or that if a return were necessary, that it was sufficient that the court could *order* them returned after payment of the judgment, and that the fact that the plaintiff had retained them until they had become worthless, would not affect his right to recover the full consideration paid.

GALUSHA PARSONS,
for Plaintiff in Error.

Supreme Court United States.

OCTOBER TERM, 1875.

CHARLES C. SMELTZER,
Plaintiff in Error,
vs.
MILES WHITE,
Defendant in Error.

No. 133.

In Error to the Circuit Court of the United States for the District of Iowa.

BRIEF OF DEFENDANT IN ERROR.

J. HUBLEY ASHTON,
N. WILSON,
Of Counsel.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1875.

CHARLES C. SMELTZER, Plaintiff in Error,
vs.
MILES WHITE, Defendant in Error.
No. 133.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR DISTRICT OF IOWA.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This was an action instituted by Miles White, a citizen of Maryland, residing in Baltimore, against Charles C. Smeltzer, a citizen of Iowa, upon certain written warranties, given by the defendant to the plaintiff at the times of the sale to the plaintiff of certain instruments purporting to be warrants of the counties of O'Brien, Buena Vista, and Clay, in the State of Iowa, whereby the defendant guarantied that the warrants were regularly issued by the authorities of the respective counties, and that they were genuine county warrants.

The case was tried upon the petition and answer, (Rec., pp. 22, 23,) before Judge Dillon and a jury; a verdict was

rendered for the plaintiff, and his damages were assessed at $4,598.81, (Rec., p. 62,) and the court entered judgment upon this verdict. (Rec., p. 64, fol. 219.)

The defendant has brought a writ of error to this judgment.

We shall submit to the court that there is no valid *bill of exceptions* in this record, and that no question of law is properly presented therein for the consideration of this court, and that the judgment must necessarily be affirmed.

The validity of the bill of exceptions will be the subject of further consideration hereafter, but it may be well to state now that the case was tried in the court below at the *May* Term, 1872, the verdict being rendered on the 24th of May, 1872. (Rec., p. 62, fol. 213.) It was agreed by the parties that the bill of exceptions might be signed at any time *before* the 10th of *June*, 1872. (Rec., p. 63, fol. 216.) The transcript, however, shows that it was not signed until the *next* October Term of the Circuit Court. (Rec., p. 64, fols. 218–220.)

The following is a brief statement of the case from the transcript:

Mr. White, the plaintiff below, who, as we have said, resided in Baltimore, purchased from the defendant, Smeltzer, a banker of the State of Iowa, in 1865 and 1866, certain instruments, purporting to be warrants of the counties of O'Brien, Buena Vista, and Clay, in that State, at their full market value. (Rec., p. 57, fol. 195.)

When he purchased these warrants he obtained from the defendant written guaranties, to the effect that the warrants were regularly issued by the authorities of the respective counties, and that they were genuine county warrants.

Payment of the warrants having been demanded, and refused, the plaintiff brought suits upon them at the May Term, 1870, of the Circuit Court of the United States for

the District of Iowa, against the three counties of O'Brien, Buena Vista, and Clay.

The declaration in each of those cases averred that the warrants sued on were issued under the seal of the District Court of the county, and the county defendant interposed a demurrer to the declaration, upon the ground that the warrants were not under the *proper seal of the county*. (Rec., p. 31, fol. 101; p. 56, fol. 191.)

Judgment in each case was rendered for the county defendant upon the demurrer. (Rec., p. 31, fol. 102; p. 57, fol. 193.)

The plaintiff failed in the suits upon the warrants against the counties, on the ground that the instruments had not attached to them the seal of the county by whom they purported to be issued, the Circuit Court holding that it was essential, under the laws of Iowa, to a recovery on such warrants that they should bear the seals of their respective counties. (Rec., p. 59, fol. 202.)

The transcript shows that, before the hearing of the suits against the counties, the plaintiff gave notice to the present defendant that the suits had been instituted; that the counties sought to defend upon the ground that the warrants were not attested by their proper seals; and that he was required to assist in the prosecution of the suits in view of his responsibility upon his warranties. (Rec., p. 57, fol. 194; also pp. 11, 13, 15.)

After the counties had been adjudged by the Circuit Court in those cases not to be liable upon the warrants sold by the defendant, the plaintiff instituted the present suit against the defendant upon his warranties.

The petition contained seven counts; but the seventh count was withdrawn, and verdict and judgment were on the first six counts.

Plaintiff proved the written guaranties of defendant as alleged in those counts, and as stated in the charge of the court. (Rec., p. 25; p. 59.)

He also proved the sale and delivery to him of the sev-

eral warrants in manner and form as described in those counts. (Rec., p. 25.) None of the warrants were sealed with the seal of the counties by which they purported to be issued.

It was proved that plaintiff paid for them the market value of valid county warrants. (Rec., p. 57, fol. 195.)

ARGUMENT FOR DEFENDANT IN ERROR.

I.

The Bill of Exceptions.

On opening this record, the court will find that the bill of exceptions, so called, extends from *page* 25 to *page* 64, fol. 220.

We submit that the court cannot treat this as a proper and valid bill of exceptions, and that no error can be assigned on anything contained in it. It appears clearly from the transcript that the bill of exceptions was not settled and signed until the lapse of nearly five months after the verdict, and in the *next term* of the court after the trial.

There is nothing in the transcript to explain why it was not signed during the term, and during the time allowed by the agreement of the parties, when the verdict was rendered, for the signing of the bill of exceptions. And, under such circumstances, we think the court can take no cognizance of it upon this writ of error.

The Circuit Court for the district of Iowa has two terms, which begin on the second Mondays of May and October. (Rev. Stats., 120.) The verdict in this cause was rendered on the 23d of May, 1872, May Term, 1872, (Rec., p. 62,) and the transcript states that on the same day the defendant gave notice of a motion in arrest and for a new trial, and the parties agreed that the bill of exceptions might be signed at any time *before the 10th of June*, 1872. (Rec., p. 63, fol. 216.) On the 19th of October, (it being of the October Term,) 1872, the motion in arrest, etc., was overruled, and judgment was entered on the general verdict. (Rec.,

p. 64.) And below the entry of the judgment, in the transcript, appears an entry of notice of a lien of counsel for services, dated 21st of October, 1872. (Rec., p. 64, fol. 219.) Then follow the formal conclusion of the bill of exceptions and the signature of the circuit judge. (Rec., p. 64, fol. 220.) So that the bill was not settled and signed until on or after the 21st of October, 1872.

In *Walton* v. *United States*, (9 Wh., 658,) the court said that it will be sufficient, if the exception be taken at the trial, and noted by the court, with requisite certainty; and "it may afterwards, *during the term*, according to the rules of the court, be reduced to form and signed by the judge."

This language is repeated and approved by Grier, J., in *Sheppard* v. *Wilson*, (6 H., 275.) In *Ex parte Bradstreet*, (4 Pet., 107,) Ch. J. Marshall said: "The usual practice is to request the judge to note down in writing the exceptions, and afterwards, *during the session of the court*, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial."

In *Turner* v. *Yates*, (16 H., 29,) the language of the court in *Walton* v. *United States* (*supra*) is cited by Curtis, J., who states, "to what was there said this court has steadily adhered. (4 Pet., 106; 11 Pet., 184; 4 H., 15.) The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. . . . . Their requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards (*i. e.*, after the trial) be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends; and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication."

The only case we find in which a bill of exceptions,

signed after the adjournment of the court for the term, was sanctioned, is *United States* v. *Breitling*, (20 H., 254.) But there the bill was signed only the day after the adjournment of the term; but a new term does not appear to have begun, and the judge carefully explained in a formal note attached to the bill the circumstances which he thought justified his signing it after the adjournment. This court said, "under the circumstances stated in the exception and note, we think he was right in doing so, and that the exception is legally before the court."

There is nothing, however, in the present record which explains why it was that the bill of exceptions was not tendered to the court by the plaintiff in error for settlement and signature, within the reasonable time fixed by the agreement of the parties when the verdict was rendered. If a bill of exceptions can be made up at a subsequent term, five months after the trial, we see no reason why the time may not be extended to a year or more after the trial.

II.

The Assignments of Error.

First Assignment of Error.

It is thus: "*The court erred in holding that the warrants required a seal, or, if a seal were requisite, that they were not properly sealed.*"

1. This assignment does not conform in any respect to the 21st rule of this court, which requires that, when the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

In *Deitsch* v. *Wiggins* (15 Wall., 546) the court said it intended to enforce strict compliance with that rule.

2. But as the counsel for plaintiff discusses at length, under this first assignment of error, the question as to the

seal required to be affixed to county warrants under the laws of Iowa, in order to give them validity as such, and render them enforceable as instruments against the counties by which they may purport to have been issued, we shall briefly consider that question here.

The proposition on the other side is the two-fold one, that the warrants in question, which were issued all along from November, 1862, to December, 1866, would have been properly issued and valid if no seal whatever had been affixed to them, and that the seals of the District Courts of the several counties, which were the seals actually affixed to them, were the only seals which could be legally affixed to them, if any were required. (Brief, pp. 15–22.)

We maintain, on the other hand, that no warrant was regularly issued and valid as such unless it was sealed with the "SEAL OF THE COUNTY" provided by law, and that, therefore, every warrant was required not only to be issued under seal, but to be sealed with that particular seal.

Let us see how this matter stood under the laws of Iowa in force when these warrants were issued.

(*a*) First: The very question has been directly decided twice by the Supreme Court of Iowa, and in the same way in which it was decided, in 1870, by the Circuit Court of the United States in the suits brought on the warrants by the defendant in error against the counties, and by that court also in the present case.

In *Springer* v. *County of Clay* (35 Iowa, 243,) the question was presented as to Clay county warrants, issued under the seal of "the District Court of Clay county," and the Supreme Court held that the county was not liable on the instruments, and that county warrants were imperatively required to be sealed, and to be sealed with the "seal of the county," and not otherwise.

The court there said:

"'Each county . . . . is a body corporate for civil and political purposes; . . . . shall keep a seal such as provided by law, ... the inscription on which shall be:

'Seal of the County ———, Iowa,' (naming the county) in capital letters, and each new seal hereafter obtained shall be of the same description.' (Rev., §§ 221–2.)

'It is the duty of the treasurer to receive all money payable to the county, and to disburse the same on warrants *signed by the clerk of the Board of Supervisors, and sealed with the county seal, and not otherwise.*' (§ 360.) Our statute having thus expressly and imperatively declared what the seal *shall be*, and prohibited the payment of money upon any other, it was not competent for the county officers to change the statute, or to give effect to an instrument which the statute, in effect, declared invalid, by directing that money shall not be disbursed on it. (Prescott *v.* Gonser, 34 Iowa, 175.) The county may be liable on the indebtedness for which the warrants were issued, but not on the warrants as such."

In *Prescott* v. *Gonser* (34 Iowa, 178,) the same construction was placed upon the statutes; and the court there say:

"The clerk of the District Court, at the time these warrants were issued, was the clerk of the Board of Supervisors, and upon him the law devolved the duty of affixing the seal to warrants drawn on the treasury. (Rev., § 319, 321.) The Board of Supervisors constituted the body authorized to audit and allow all just claims against the county. (Rev., § 312,) and when they had audited and allowed the claims, it became the duty of this clerk to issue warrants on the treasury for the payment thereof; and he could comply with this duty only by drawing, signing, and issuing such warrants as the treasurer was authorized to pay, viz., warrants signed by the clerk, and sealed with the county seal."

There are no contrary decisions of the Supreme Court of Iowa; and this court, under its rule of adopting the construction of State statutes settled in the courts of the State, though it may not even accord with its opinion, will accept, in this case, the construction given by the Supreme Court of Iowa to the statute law of that State, especially as the only point presented is as to duties of State officers. (Supervisors *v.* United States, 18 Wall., 82, and cases cited by Mr. Justice Strong.)

"It is true," said Mr. Justice Strong, "that where we

have been called upon to consider contracts resting upon State statutes, contracts valid at the time they were made, according to the decisions of the highest courts of the State, contracts entered into on the faith of those decisions, we have declined to follow later State decisions declaring their invalidity. But in *other* cases we have held ourselves bound to accept the construction given by the courts of the States to their own statutes."

(*b*) Second. But the answer given by the Supreme Court of Iowa to the question as to the seal necessary to be affixed to such warrants to render them valid, is the only one that could be given, if the question were an original one in this case.

The act of March 22, 1860, (Rev., sec. 302, *et seq.*,) created a county Board of Supervisors for each county. And by the act of April 2, 1860, (Rev., sec. 330,) it was enacted that all laws in force at that time devolving any jurisdiction or powers on county judges should be held to apply to and devolve such jurisdiction upon the "county Board of Supervisors," in the same manner as though those words occurred in said laws instead of "county judges."

By sec. 11 of the act of March 22, 1860, (Rev., sec. 312,) the Board of Supervisors was authorized "to examine, settle, and allow all just claims against the county, unless otherwise provided by law." By sec. 18 of that act (Rev., sec. 319) the clerk of the District Court was constituted the clerk of the Board of Supervisors, and he was required "to sign all orders issued by the board for the payment of money," etc.

Formerly the county judge was required to draw and sign orders or warrants for the payment of money; but that duty devolved, under the act of 1860, as we have seen, on the clerk of the Board of Supervisors; so that section 360 of the Revision of 1860 is to be read as follows: "It is the duty of the treasurer to receive all money payable to the county, and to disburse the same on warrants drawn and signed by the *clerk of the Board of Supervisors*, AND

SEALED WITH THE COUNTY SEAL, AND NOT OTHERWISE." (See Revision 1860, p. 60.)

Now, in regard to the *county seal*, Rev. sec. 221 required each county to keep a seal such as provided by law; and by sec. 222 the county judge was required to obtain for his county a new seal, of the same size with the present one and with the same device, but the inscription on which shall be "Seal of the County of ———, Iowa," (naming the county,) in capital letters, and each new seal hereafter obtained shall be of the same description."

It is manifest, therefore, that no warrants on the treasurer could be lawfully paid by the treasurer unless they were signed by the clerk of the Board of Supervisors and sealed with the seal prescribed in sec. 222, which was the only lawful *county seal*. Of course, it was the duty of the clerk of the Board of Supervisors to affix this seal, and no other, to all warrants drawn, signed, and issued by him under the authority of the board, as they were the only warrants the treasurer was authorized to pay.

In *Clarke* v. *Polk County*, (19 Iowa, 256,) decided in 1865, the Supreme Court said: "The clerk of the Board of Supervisors is the proper person to execute and issue county warrants. As such he is entrusted with the seal, and is the custodian of the blank warrants usually prepared for the counties."

By sec 24 of the act of 1860 creating the Board of Supervisors it was provided also, in general terms, that "in all cases where the powers hereby conferred upon said board have heretofore been exercised by the county judge, county court, or other county officers, the supervisors shall conduct their proceedings under said powers in the same way and manner, as nearly as may be, as is now provided by law in such cases for the proceedings of said county judge." etc. (Rev., sec. 325.)

The idea of counsel that, conceding that the treasurer could not pay warrants without the county seal, the county was nevertheless liable in a suit brought on them as instruments, is absurd. It might as well be said that warrants

issued without the signature of the clerk were good warrants and the subject of suit against the county. The fact is, they could not be county *warrants* at all, unless they were both signed, and sealed with the proper seal, as directed by law.

Second and Third Assignments of Error.

These so called assignments of error are mere statements of legal propositions maintained by plaintiff in error, and are amenable to the same objection as the first assignment in regard to their form.

Under them, however, counsel has discussed the question of the construction and effect of the guaranties sued on, viz: whether or not they extend to and include an infirmity or defect in the county warrants sold to defendant in error, arising out of the absence from them of the county seals established and provided by law.

Upon this question the defendant in error need say but a few words. Plaintiff in error contends that nothing was warranted, but that the warrants were not actual forgeries; that they were not issued without consideration; and that they were *ordered* by the proper officers. (Brief, p. 23.)

But this is an absurd view of these contracts. Such a construction does not comport with the fair, natural, and obvious import of the words of the contracts, or conform to the evident intent of the parties as ascertained from the circumstances under which the contracts were made.

The rule of interpretation is well settled.

Even in the case of a technical *guaranty* it has long been established that the words of the guaranty are to be taken as strongly *against the guarantor* as the sense will admit. This court so laid it down in *Drummond* v. *Prestman*, (12 Wh., 515,) and the principle was reaffirmed in *Douglass* v. *Reynolds*, (7 Pet., 122.) The rule in England is the same. (Mason *v.* Pritchard, 12 East., 227; Mayer *v.* Isaac, 6 M. & W., 605; Wood *v.* Prestner, L. R., 2 Ex., 66.)

A fortiori the rule is the same in the case of a warranty, where the sale is the consideration.

In *Douglass* v. *Reynolds* (7 Pet., 124) Story, J., said, in construing a guaranty, "the whole words and clauses are to be construed together, and that sense is to be given to each which best comports with the general scope and intent of the whole."

And, in a very recent English case, it was held that, in construing a guaranty, it was proper to look at the *surrounding circumstances* to see what was the subject-matter, which the parties had in their mind when it was given—to ascertain the scope and object of the intended guaranty. (Sheffield *v.* Meadows, L. R. 4 C. P. 595.)

Now, the guaranty here is not merely that the instruments sold were *county warrants*, but that they were *genuine* county warrants; and not merely that they were genuine county warrants, but that they were *regularly issued by the authorities, or regular authorities, of the counties.* (Rec., p. 59.)

If such a guaranty as this does not include *everything* necessary to render the instruments regular and valid—perfect county warrants, legally enforceable as such against the counties—then the English tongue could not express such a warranty, and is a failure as a language.

If the warranty had been simply that the instruments sold were "county warrants," it would have been sufficient to embrace such a defect, for they could not be *county warrants* unless they were sealed with the proper seal, as well as signed by the proper officer. The clerk of the Board of Supervisors had no authority to put them out without the proper seal. The nature of such warrants was to some extent considered in *Supervisors* v. *U. S.*, (18 Wall., 77.) Speaking of these county officers, this court said, "such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred on them by the author of their being." As the law required the clerk to sign and seal the warrants, he had no authority to issue them otherwise, and they were not county warrants unless so issued.

But the warranty was that they were "genuine county warrants." Genuine, in this connection, means "real," "true," as where Dryden says, "true, genuine night." This term only intensifies the assurance given that the warrants were complete and perfect instruments.

Then, again, the warranty is, that they are "*regularly issued by the authorities*" of the counties. If anything were wanting in the other terms of the contract to make an absolute assurance that the warrants were perfect instruments, these words would supply the deficiency. They could not be regularly issued without the seals any more than without the signatures, or the order of the Board of Supervisors. All these elements were necessary to the regular issuance of the warrants, and all were warranted to exist when it was guarantied that the instruments were "regularly issued by the authorities."

It is manifest from the language used that what the parties intended was, that there should be an absolute warranty that the instruments were legally enforceable as warrants in actions against the counties.

As the instruments could not be binding and legally enforceable as warrants by action against the counties unless they were regularly issued, a warranty that they were regularly issued was in legal effect a warranty that they were so legally enforceable, and that suits could be maintained on them against the counties.

This construction becomes all the more necessary when we consider the situation of the parties as citizens and residents of different States, the warrantor being a banker of Iowa, and the warrantee a resident of Maryland. The warrantee, knowing little or nothing in fact about the laws of Iowa, presumably intended to protect himself against just such a contingency in the judicial construction of those laws as to county warrants as has occurred. He may be supposed to have said to the seller: "I will buy these warrants at the market price if you will warrant that every formality requisite to render the counties liable on

them has been complied with, otherwise not." The seller gives him such a guaranty, and the sale is made. The fiction that the purchaser living in Maryland knew as much about the law of Iowa as the seller, has no place in the interpretation of such a transaction as this. The true presumption in the case of such a purchaser, demanding such a warranty, is, that he knew nothing and assumed to know nothing as to the law of Iowa applicable to these warrants, and took the warranty expressly for the purpose of protecting himself against his own ignorance. Certainly he was not bound to inquire what the law of Iowa was, or might be held to be, when he paid the Iowa seller to give him a warranty that the law was complied with, and everything was right about them.

What adequate protection would a purchaser in Baltimore receive from a simple warranty that the warrants were issued for valid claims?

What he intended to buy were evidences of indebtedness on which, in the event of non-payment, judgments could be readily obtained against the counties. And as no action could be maintained upon such instruments unless they were executed and issued in the manner prescribed by law, a warranty simply that they were issued for legal and proper claims against the counties, would afford, of course, no sufficient protection to a purchaser. The only warranty that would protect him against loss, in case it should turn out that the county officers neglected to comply with the law prescribing the mode in which county warrants should be executed and issued, would be a warranty coextensive with the defenses to which such instruments were subject in suits against the counties, founded upon non-compliance with the State law on the part of the county officers.

The plain, common-sense view of the intention of a purchaser taking a warranty, under the circumstances surrounding these transactions, is that he meant to require *such* a warranty as would protect him against loss in the event of failing to recover against the counties, on account of any informality that might be decided to exist in the paper as

issued by the county officers—a warranty upon which he could fall back for indemnity in case of failure to recover judgment against the counties upon the paper.

We submit that the plain interpretation of the present warranties is, that they include, among other stipulations on the part of the guarantor, an undertaking on the part of the seller of the warrants that the paper was not subject to any defense on the part of the counties founded upon the character of the seals affixed to them, and that the seller would indemnify the purchaser if it should turn out that the counties were not liable upon the paper in consequence of the absence from them of the proper county seals.

Fourth Assignment of Error.

"*The court erred in holding the defendant estopped by the former judgments. See charge printed, second specification.*"

The answer to this is threefold. (1.) The charge is not set out according to rule. (2.) There was no objection made or exception taken at the trial to *anything* said in paragraph II of the charge, in regard to the former actions against the counties. (See Rec., p. 60, fol. 206.) And, (3,) the court did *not* hold the defendant *estopped* by the former judgments.

A few words need only be said in regard to the last objection to this assignment of error:

1st. It would seem from the text of the 2d paragraph of the charge that the reference in it to the former judgments was no more than a statement, that the *fact* of the absence of the county seals was embraced in the decision in the actions against the counties. But if it is susceptible of a broader interpretation, still it was not an instruction that defendant was estopped by the result of the suits against the counties. The warrants were in evidence, and themselves proved that they were without the county seal; and the court decided on this trial that this was a defect which invalidated the warrants, and a defect within the contracts

sued on, and consequently that the warranties were broken and defendant was liable. This liability was not rested on the judgments for the counties in the former suits, and defendant was not held necessarily concluded by those judgments.

2d. The admissibility of the judgments in the suits against the counties as evidence in this case is not a question here; but if it were, there could be no doubt that those judgments were competent evidence to prove that the warrants could not be recovered on by the plaintiff, and were worthless as warrants, if for no other purpose. That a judgment may be admissible in evidence as a fact, and for the purpose of showing its effect and operation in cases where it cannot operate as an estoppel, is a familiar principle. (Haight *v.* Hoyt, 19 N. Y., 464; Key *v.* Dent, 14 Md., 86.)

3d. We have no doubt, however, that the court below might well have treated the former judgments as conclusive against this defendant.

The first and simplest view is, that as the contracts sued on, by their nature and meaning, stipulated that the warrants were legally enforceable as warrants, and that an action could be maintained on them as such against the counties, the defendant undertook, in effect, to abide by the result of such litigation, and connected himself in privity with the proceedings in those cases, and made the judgments conclusive against him. (1 Greenl. on Ev., § 523; Lincoln *v.* Blanchard, 17 Vt., 474; Brown *v.* Sprague, 5 Denio, 545.)

Clearly the defendant was by his agreement bound as a privy to the judgments in the former suits, if, under that agreement, it was necessary that plaintiff should fail to recover upon the warrants against the counties before he could proceed against the defendant on his warranty. (Walker *v.* Ferrin, 4 Vt., 529.)

4th. But we maintain, independently of this view of de-

fendant's contract, as an undertaking on his part to be answerable for the result of the suits against the counties, upon the general principles of law which define the reach of the estoppel of judgments, that the judgments in the suits prosecuted against the counties on these warrants were conclusive evidence, in this case, against the defendant.

We think no court has gone further than this court in giving effect to the maxim that public tranquility demands that all litigation of a question once fairly tried and between those parties, should be closed forever, and in extending the definition of *who are parties*, in the sense of this maxim. (See the able opinion of Miller, J., in *Lovejoy* v. *Murray*, 3 Wall., 18.)

It was early settled in this court that a judgment against a party to be indemnified (especially if obtained on *notice* to the warrantor) is admissible in a suit against the warrantor on his contract of indemnity. (Clarke's Ex's *v.* Carrington, 7 Cr., 322.) Even in the case of a mercantile guaranty, the court has held that a judgment recovered on an account against the principal is evidence of the amount due in an action against the guarantor. (Drummond *v.* Prestman, 12 Wh., 515.) And, in the case of administrators' bonds, it has decided that a judgment or decree against the administrator is conclusive upon the sureties. (Stovall *v.* Banks, 10 Wall., 588; Laflin *v.* Bank, 7 How., 220.)

Further, the court has held that a private party is concluded by a judgment against a corporation for his negligence, if he knew the suit was pending, and *could* have defended it. Express notice to the party ultimately liable of the pendency of the case, or that he would be looked to for indemnity by the corporation, was decided to be unnecessary. (Chicago *v.* Robbins, 2 Black, 423; S. C., 4 Wall., 658.)

In the last case the court say: "All who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear, and avail themselves of their rights, are equally concluded by the proceedings."

And in *Lovejoy* v. *Murray*, (3 Wall., 18,) the plaintiff in an attachment, who indemnified the attaching officer, and undertook the defense of the officer, in an action of trespass, was held concluded, when sued himself, by the former judgment against the officer.

There seems no reason to doubt, under the decisions of this court, in cases closely analagous, that this defendant, having had express notice of the suits against the counties, and the right to submit therein all he desired upon the question as to the regularity and validity of these warrants, should be held concluded by everything adjudged in those suits.

But the question of the estoppel of the former judgments is directly answered by the well-considered decision of the Supreme Court of Vermont in *Carpenter* v. *Pier*, (30 Vt. 81.) In that case there was a sale of a promissory note, the seller warranting that it was valid and given for a good consideration. In a suit against the maker, the defendant set up the defense of want of consideration, and the seller or warrantor was notified of the suit, and required to attend and prosecute it. And the court held that a judgment against the plaintiff in that suit was conclusive upon the seller of the note in an action against him on his warranty.

That was substantially the present case.

The decision of the court (Aldis, J., delivering the opinion) was rested upon the general principle often adjudged, that if a person sell real or personal property with a warranty of title, and the purchaser finds, on suit brought, that the validity of the title is denied, he may notify his warrantor to maintain the title in the suit so brought; and if the warrantor neglect or refuse to do so, and a recovery is had against the title so warranted, such judgment will be conclusive evidence against the warrantor upon every fact established by it. (Rawle on Covenants for Title, 226; Blasdale *v.* Babcock, 1 Johns., 518; Barney *v.* Dewey, 13

Johns., 225; Fisk *v.* Woodruff, 15 Ill., 15; Thurston *v.* Spratt, 52 Maine, 202.)

See also decision of the Supreme Court of Vermont in the earlier and well-reasoned case of *Walker* v. *Ferrin*, (4 Vt., 529.)

It is not necessary to refer at length to that large class of cases in regard to sureties on official bonds, (sheriffs', constables', etc.,) in which the courts in this country have generally held it to be a universal principle, that an engagement by one man to be responsible for another creates such a privity between them as to render a recovery against the latter conclusive in a suit brought on the guaranty, even where the surety received no notice. (City of Lowell *v.* Parker, 10 Met., 314; Masser *v.* Strickland, 17 S. & R., 354; Evans *v.* Commonwealth, 8 Watts, 398; Thomas *v.* Hubbell, 15 N. Y., 405.)

In regard to such sureties, the courts have applied the rule recognized by this court in the case of sureties of administrators, in *McLaughlin* v. *Bank of Potomac*, (7 How., 220,) and *Stovall* v. *Banks*, (10 Wall., 583,) and in the case of sureties in ordinary contracts of guaranty, *Drummond* v. *Prestman*, (12 Wh., 516.)

We submit, therefore, that the plaintiff's case was conclusively established when he produced in evidence the records of the judgments in the suits against the counties, which determined that these warrants, being without the county seals, were not the subject of action against the counties, and were irregularly issued and invalid as county warrants.

Fifth Assignment of Error.

The court was right, of course, in overruling the offer to show that the warrants were issued for legal claims against the counties. Such evidence was irrelevant to the issue in this case. The merits of the original claims were not in controversy. Plaintiff was entitled to recover on his warranty, when it appeared that the warrants were not

properly sealed, if that defect was within the terms of the guaranty, as we have shown it was. The validity of the original indebtedness would not impart validity to the warrants if they were executed and issued without compliance with the laws of the State.

It is impossible also to see how the character of the original claims could affect the question of damages.

The guaranty was, in legal effect, that the warrants were not defective in the condition in which they were sold, and that suits were maintainable on them as warrants. Plaintiff did not stipulate, nor was he obliged by any duty to defendant, to make any effort, before or after his failure to recover on the warrants, to have them perfected, if they could be, or to prosecute any suit on the original indebtedness, if he could do so. Defendant undertook to sell plaintiff certain property, to wit, county bonds, and guarantied that it was what it purported to be; and this warranty was broken when it turned out that the property was not as represented in the contract, and defendant became liable for the whole loss which plaintiff sustained.

The warrants, in the condition in which plaintiff received them, never were good for anything as warrants. They could not be reduced to judgments against the counties, and when this was ascertained, the plaintiff had at once a right to look to defendant for indemnity.

The adjudications in the former suits, of which defendant had notice, determined that the warrants were *null* and *void*, and defendant became liable, therefore, on his warranty, for the full value of the securities.

Evidence that they were issued for legal claims could not affect these damages, because if so issued the judgments in the former suits determined that they were nevertheless invalid, and not the subject of actions against the counties, and they were wholly lost to plaintiff.

Clearly it is no answer to a suit for breach of warranty on account of a defect warranted against, which renders the property worthless, that, in other respects, the warranty has been complied with.

Sixth Assignment of Error.

Plaintiff in error passes this without argument. It appears, however, not to differ from the 1st and 2d assignments of error.

Seventh Assignment of Error.

Under this assignment plaintiff in error sets out at length the 3d paragraph of the court's charge, which relates to the measure of damages, and means, we suppose, to assign error upon it. (Rec., p. 59, fol. 203.)

1. But no error can be assigned upon this instruction, because no *exception was taken at the trial to anything contained in it.* On *page* 60, *fol.* 206, of the record, is the general exception to certain "portions of the charge," there referred to; but that portion of the charge, set out under the 7th assignment of error, is not included in that general exception, and, of course, it cannot be now reviewed. Rule 4 of this court requires a party excepting to state distinctly the several matters of law in the charge of the court to which he excepts, "and those only shall be inserted in the bill of exceptions and allowed by the court." This bill of exceptions, as respects the charge, is not framed in proper conformity to this rule. But it is enough to say that, as respects the matter of law in the 3d paragraph of the charge, it is not in the exception as framed by plaintiff in error.

2. The instruction, however, as to the rule of damages was correct. The warrants were shown to be worthless by the judgments against the plaintiff in the former suits; and the only question for the jury, therefore, was the value of the warrants, if they had been such as vendor warranted them to be. Upon this question the jury were correctly told that the price paid was *prima facie* evidence of their value at the time of sale. The rule is well settled that, in an action for breach of warranty, the price is strong evidence of what the property would have been worth, if the

warranty had been true, which the jury ought to follow in the absence of contravening proof; and, in this case, there was no such proof. (Lord Denman in Clare *v.* Maynard, 7 Car. & Payne, 741; Cox *v.* Walker, 6 Ad. & El., 523; Blanchard *v.* Ely, 21 Wend., 349; Cary *v.* Gruman, 4 Hill, 625; Fisk *v.* Hicks, 11 Foster, 539; Reggio *v.* Bragiotti, 7 Cush., 169.)

Besides this presumptive evidence of value, there was direct evidence in the case (Rec. p. 57, fol., 195) that the price paid by plaintiff was the market value of warrants which conformed to the warranty.

The measure of damages, therefore, in this case, was the value of the warrants, if they had corresponded to the warranty, or, in other words, the consideration paid for them.

"In this country," said Shaw, C. J., "the established rule in relation to damages in such actions is, that the plaintiff may recover what he can show he has actually lost. If an article is worthless, then he shall recover what would have been its value to himself, had it corresponded with the terms of the warranty." (Reggio *v.* Bragiotti, 7 Cush., 169.)

It is clear that, in such a case as this, no rule of damages which would give the plaintiff less than the consideration paid would do anything like justice between the parties.

The Supreme Court of Massachusetts, in a well-reasoned opinion by Bigelow, C. J., in the case of the assignment of a chose in action, which was defeated of its intended effect by a previous act of the assignor, by which the assignee lost the amount of the claim assigned, and the money was collected by a third person, held that, in the absence of fraud, the amount paid by the assignee, with interest, was the proper measure of defendant's liability. There was in that case no warranty, (as there is here,) and if there had been, the court would undoubtedly have given the full amount of the claim as finally collected.

Eaton *v.* Mellus, 7 Gray, 573.

Eighth Assignment of Error.

Plaintiff in error furnishes us no argument in support of this assignment of error, which seems, too, to be very obscurely expressed; but the point intended to be raised, we suppose, is whether or not defendant in error was obliged to show that he tendered back the warrants before suit was brought, in order to entitle him to recover upon his guaranty the damages which we have shown he sustained?

The court instructed the jury correctly, that it was not necessary, to enable him to so recover, that he should have so tendered back the property. And the court was undoubtedly right; for if anything in this department of the law is settled, it is that an action lies for breach of warranty, without tendering or returning the property, or giving notice of the defect. "A warranty," says Shaw, C. J., "is a separate, independent, collateral stipulation on the part of the vendor with the vendee, for which the sale is the consideration. It is not a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods and have a remedy for his damages by action." (Dorr *v.* Fisher, 1 Cush., 273; also Vincent *v.* Leland, 100 Mass., 434.)

And in Massachusetts it has been expressly held that vendee may sue for breach of warranty without returning the goods, although vendor engages that the property may be returned, if it does not fulfill the contract. (Manuf. Co. *v.* Gardner, 10 Cush., 83.)

Kent says: "In the case of a breach of warranty, he may sue upon it without returning the goods." (4 Kent, 480.)

Mr. Story says: "If the contract be executed, and the goods be completely accepted, so as to pass the property to the vendee, it is very generally held that he cannot elect to rescind the contract and return the goods, after

he had a right to retain them at least until plaintiff in error satisfied the judgment for those damages.

Plainly, if plaintiff in error has the rights of a guarantor or surety against defendant in error, as respects the warrants, he can have no equity to have them transferred to him until he has paid the judgment. A surety is not entitled to have an assignment of the principal security until he actually pays the money for which he is liable. (De Colyar on Guaranties, 330.) And this court has held that nothing short of a satisfaction of a judgment in an action of trover vests the title of the property converted in the defendant. (Lovejoy *v.* Murray, 3 Wall., 15.)

Ninth Assignment of Error.

This and the 10th, 11th, and 12th assignments of error are to refusal of the court to charge as requested by plaintiff in error upon certain propositions submitted by him. (See Rec., pp. 60, 61.) The record says the court refused to instruct the jury as requested, "*except so far as embraced in the court's charge*," etc., and "*declined* to charge said propositions, or any of them, which rulings and decisions, so made as to each of said propositions, counsel for the defendant duly and separately excepted." (Rec., p. 61, fol. 210.)

It is difficult to tell whether this means that the court declined to pass at all upon the propositions, except so far as embraced in the general charge, or decided the propositions against the plaintiff in error. It is clear, however, that the law of the case on all the essential features of it was correctly stated in the charge of the court; and as these propositions conflict with the doctrines of the charge, on the great points of the case, they are erroneous.

As to the proposition embraced in the *9th assignment of error*, that defendant in error could not recover if he did not offer to return the warrants before suing, and still held them, without any offer to surrender them, it is unnecessary to say anything in addition to the argument submitted under the *8th assignment of error*.

Tenth Assignment of Error.

This is stated to be the refusal of the court to charge, as requested, "that the former judgments do not estop defendant from showing that said warrants are valid; that the question of their validity depends upon whether they were duly ordered by the boards of the several counties named, and not upon the mode of their formal execution by the clerks of such boards."

This prayer might have been well refused, on the ground that if the proposition was correct, as matter of law, it was not, as framed, an instruction that it was proper to give the jury at that stage of the case. The court had excluded evidence to prove that the warrants were issued for proper and legal claims against the counties, on the ground that it was no defense to this action, and that the warrants had been adjudged invalid in the former suits. The jury therefore could not determine the question whether they were duly ordered by the Boards of Supervisors or not. If the court therefore had said the defendant was not estopped by the former judgments from showing that the warrants were valid, in the sense of having been duly ordered by the boards for proper claims against the counties, the jury could have made no use of the instruction in coming to a conclusion; for, as we have said, the jury had no evidence on that subject before them.

But the instruction asked was properly refused, on the further ground that it was manifestly incorrect to say (as it required the court to do) that the question of the validity of the warrants depended upon whether they were duly ordered by the Board of Supervisors. This matter has been already considered. It was adjudged in the suits against the counties on these warrants. It was determined by the Supreme Court of Iowa in the cases in 34 and 34 Iowa, before cited. That court has always held that county warrants must be executed and issued in strict conformity with law to constitute valid obligations of the counties.

The powers of the counties as corporations are such only

as are granted by law, (Webster Co. *v.* Taylor, 19 Iowa, 119,) and the clerk of the Board of Supervisors possesses no powers other than those specially prescribed by statute, and he cannot bind the county further, or in any other manner, than he has *express* authority to bind it. (Clark *v.* Polk Co., 19 Iowa, 251.)

The second proposition, embraced in the prayer now under consideration, was manifestly incorrect, and the whole prayer was, therefore, properly refused.

In regard to the first proposition in that prayer, to wit, that the former judgments did not estop defendant from showing that the warrants were valid, in so far as it raises the general question as to the conclusive effect of the former judgments, we have already said all that we deem it necessary to submit in discussing the *4th assignment of error.*

It must be clear, that the judgments in the former suits that the warrants were *null* and *void* precluded all contestation of that matter in the present suit.

Eleventh Assignment of Error.

This is to the alleged refusal of the court to charge, that "if the jury find from the evidence that said warrants were regularly issued by order of the boards, for a valid and subsisting indebtedness, etc., and that plaintiff has not, at any time, offered to return them, he can only recover the difference between their value without the county seal, and their value with said seal at the time of the several sales, and interest."

1. It is all sufficient to say, in regard to this prayer, that there was not a *scintilla* of evidence before the jury to show that the pretended warrants, as issued and sold and received by defendants in error, without the county seals, had any value, and, if any, what value, as such, at the time of the several sales; and the jury were not, therefore, entitled to find that they had a value, much less what that value was, especially in the face of the direct evidence founded upon the records of the suits of plaintiff below against the counties, on these warrants, in which judgments were

rendered against him, declaring the warrants null and void, and which were cogent proof that the warrants had, and could have had, no value whatever.

Surely those judgments were sufficient to show that these instruments were, in the plaintiff's hands, worthless pieces of paper. In the nature of things they could have no value. A chose in action, which is *not* a chose in action—that cannot be reduced to possession by judgment against any debtor—is simply *nothing*. A chose in action is said to be in *potentia*, rather than in *esse*, but when the thing called a chose in action is not a promise of any party who can be sued upon it, and is not a promise which can be reduced to possession by judgment, it cannot be said to be even in *potentia*, and certainly a thing not in *potentia* is nothing. The plaintiff having shown by the former judgments that the pretended warrants were null and void, and were not the subject of action against the counties, if it was relevant and admissible to show that money value could be predicated of them, notwithstanding these facts, it was incumbent on defendant to assume that burden; but, as we have said, the bill of exceptions contains not a particle of proof to rebut the presumption that the pretended warrants were without value, created by the records given in evidence by the plaintiff. And the jury were not authorized to find that they had a value, much less the amount they were worth, in the absence of evidence of either of those supposed facts.

2. There is a manifest confusion of ideas in the argument of plaintiff in error on this subject of the value of the "*warrants*" in the condition they were in when sold. Without the seals the "*warrants*" could have *no* value as such. What counsel really has in mind is the imaginary value of some supposed right to require seals to be affixed to them which the holder might be thought to have possessed. This would have been a right, if it existed separate and apart from the "warrants" so called, the successful exercise of which might have *imparted* value to the "warrants," which they never had before, but the "warrants," as such, were value-

less. But surely it will not be contended, if such a right can be said to have existed with an appreciable value, that it was any duty of the purchaser, living in Maryland, after buying these supposed securities with an express *warranty* that everything was right about them, to go the next day to Iowa and get the Board of Supervisors to affix the seals, and to pay counsel to get out writs of *mandamus* if the officers refused to affix them. It is equally absurd to suppose that it was the duty of the defendant in error to return the paper to plaintiff in error that *he* might have the benefit of the supposed right to require it to be sealed. It has never yet been heard that a party is bound to protect his warrantor in any such way against the full measure of that warrantor's liability under his contract.

The whole theory of the argument on the other side is, that it was the business of this purchaser to see that the seller, who had given a warranty of quality, suffered as little loss as possible, and if he did not, he must suffer in his damages to the extent that the seller might have been protected by him from loss. The purchaser is under no responsibility of that sort to the seller. He owes no duty whatever to the seller. The only duty in the case is that owing by the seller to the purchaser, and that springs out of the obligations of the warranty. If the purchaser may rescind the contract, he is the sole judge of whether it shall be rescinded, or whether he will rely on his warranty for protection; and in neither case is he bound to consult the interests of the seller, or do anything to protect him against the actual consequences of the breach of warranty. The seller, it has been held, cannot even derive an advantage from a re-sale by the purchaser at a greater price, and is liable in that case for full damages, as much as if the purchaser had resold at a loss. (Brown *v.* Bigelow, 10 Allen, 244.) Bigelow, C. J., well says in that case, "the disposition a purchaser makes of property is an independent and collateral fact, having no connection with the bargain by which he acquired his title. It is difficult to see how it can have any legitimate bearing on the damages

which another person ought to pay him for a breach of a wholly distinct and separate contract."

This defendant in error was not bound to return or tender the "warrants" to the seller in order that he might realize what benefit he could from the supposed right to have the seals affixed, or else suffer a deduction from his (defendant in error) damages. He had a right to hold on to his contract, and the warrants, just as they were, and require his warrantor to pay all damages sustained as the natural consequence of the breach of warranty. The contract guarantied the purchaser that the subjects of sale were real, genuine county warrants, valid and obligatory, in the form in which they were, on the counties, and it imposed no duty on the purchaser before suing for any breach of the warranty to take any steps to enable the seller to escape from the natural and ordinary consequences of such breach.

And the law assumes that the seller, when he made his contract, understood this, and entered into the contract with his eyes open to all those consequences.

3. But it is folly to talk of the value of this supposed right to have seals affixed. When some of these warrants were bought, the limitation of three years (Prescott *v.* Gonser, 34 Iowa, 179) had nearly, if not quite, run against any suit for *mandamus;* and suits were barred, we suppose, on them all before defendant in error found out that they were good for nothing. At what time, in the history of this business, was he bound to tender a return of the "warrants" to the seller? The day after the sale, or when it was finally understood they were not valid? We have yet to learn that anybody knew, till *Prescott* v. *Gonser* was decided in 1872, that *mandamus* would lie; and it appears, in that case, that as late as 1870 the county officers refused to affix the seals. We are not at liberty, therefore, to suppose that plaintiff in error, if he had got the warrants back in time to avoid the bar of the statute, could have pro-

cured the seal to be affixed by suit against the officers, or otherwise.

Twelfth Assignment of Error.

It is unnecessary to reply at length to the argument in support of this assignment, which maintains that the plaintiff below could not recover even nominal damages, and that the verdict could only be for defendant, if plaintiff retained the warrants without offering to return them until an action on the original indebtedness and the right to sue out a *mandamus* were barred by statutes of limitations.

The fallacy of the argument must be apparent. It proceeds avowedly upon the ground that the plaintiff below had only one remedy, and that was to rescind or offer to rescind the contract of sale, and unless he did so, he was wholly remediless, notwithstanding the contract of warranty. The answer is very plain. There is no authority to be found in any country or in any State for the notion that upon discovering a breach of warranty, the purchaser is bound to rescind the contract of sale, and return, or offer to return the property, and that such rescission is his only remedy for the breach of warranty. We have already seen that if the purchaser may rescind he is not bound to do so, but may retain the property and sue on the warranty for his damages, and, if a breach is proved, he *must* recover. (See argument, *supra*, 8th assignment; Lyon *v.* Bertram, 20 How., 154.)

But plaintiff in error maintains also, that we cannot recover unless we not only returned or tendered the warrants, but also returned or tendered them, at our peril, before the statute of limitations had run against a *mandamus*, *i. e.*, within three years from the time they were issued. Well, we suppose even if we were bound to send them back, we had a reasonable time after discovering the breach of warranty within which to do so. We have asked above, when were we informed that there was a breach of the warranty? How could we have discovered that there was a breach before the Circuit Court in 1870 decided against

us on the warrants? And plaintiff in error himself admits, that before that time the claims on which they were issued, if they were of even dates with the warrants, which is not proved, and it is probable they were of an earlier date, were most of them barred by the statute, and the remedy by *mandamus* against the county officers was barred as to all of them.

Certainly no purchaser with an absolute warranty like this was ever loaded down with such a weight of duties and obligatious as counsel would seek to put upon the shoulders of this defendant in error.

It is well for every purchaser with a contract of warranty that the learned counsel's views are not the law merchant of the land.

Thirteenth Assignment of Error.

This assignmeut is not founded on any exception taken at the trial.

The judgment below we submit should be affirmed with costs.

J. Hubley Ashton,
N. Wilson,
Of Counsel for Defendant in Error.